

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
AMENDED INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION
(Pre-publication of Notice Statement)

Amend Sections 150.02 and 150.04
Title 14, California Code of Regulations
Re: Permits to Commercially Take Deeper Nearshore Fish Species

- I. Date of Initial Statement of Reasons: November 25, 2002
- II. **Date of Amended Initial Statement of Reasons: January 7, 2003**
- III. Dates and Locations of Scheduled Hearings:
 - (a) Notice Hearing: Date: December 6, 2002
Location: Monterey, CA
 - (b) Adoption Hearing: Date: February 7, 2003
Location: Sacramento, CA
- IV. Description of Regulatory Action:
 - (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

Resulting from the Marine Life Management Act of 1998 (Chap. 1052, Stats. 1998), existing law authorizes the Fish and Game Commission (Commission) to adopt regulations to manage nearshore fish stocks. These species are defined as a group in Section 1.90, Title 14, California Code of Regulations (CCR). During the interim phase of nearshore fishery management, prior to adoption and implementation of the Nearshore Fishery Management Plan (NFMP) in the fall of 2002, the Commission defined fishing seasons, altered bag limits, capped allowable catches, and established sport and commercial allocations for several nearshore fish stocks. The Commission has also approved many state regulations which conform to federal regulations adopted by the Pacific Fishery Management Council (PFMC) regarding the sport and commercial take of nearshore species.

Additional statutes (Fish and Game Code Sections 7071 and 8587.1) call for the Commission to develop and implement restricted access programs as a management tool for the state's commercial nearshore fisheries. Under this management authority, the Commission has adopted increasingly restrictive regulations on issuance and renewal of Nearshore Fishery Permits (NFP).

These NFPs authorize the commercial take of California sheephead, California scorpionfish, cabezon, two species of greenlings, and five shallow nearshore rockfish species (defined in Section 1.91, Title 14, CCR). Following a two-year scoping process, the Commission is set to adopt new regulations in December 2002 which will establish a comprehensive regionally-based restricted access program for these ten species to be implemented by April 2003. The regulations will specify levels of prior participation in the fishery needed to qualify for initial permit issuance, and include limitations on fishing areas, provisions for permit transferability and gear endorsements.

However, a similar program to restrict the number of commercial permits has yet to be developed for the nine other nearshore species defined in Section 1.90, Title 14, CCR. These species include black rockfish, blue rockfish, brown rockfish, calico rockfish, copper rockfish, monkeyface eel, olive rockfish, quillback rockfish and treefish. All of these species, with the exception of monkeyface eel, are included in a group defined by the PFMC as "deeper nearshore rockfish," for which there is now a federally established optimum yield (OY) beginning in 2003.

Commercial fishing pressure on this group of deeper water nearshore rockfish is likely to significantly intensify for two reasons: (1) As the requirements for issuance of NFPs which authorize take of the other ten species become more restrictive, there is a strong likelihood that this fishing effort will shift directly to the deeper water non-restricted component of the nearshore fishery, and (2) Closure of continental shelf rockfish fisheries have displaced former shelf rockfish fishermen and impacted participants in many non-rockfish fisheries based on interactions with overfished rockfish species. These fishermen have likely redirected their efforts into either slope fisheries or nearshore waters where some opportunities still exist.

The Commission is proposing to adopt regulations which would establish a new permit specifically to cover these nine other species in an effort to prevent this additional fishing effort from having a negative impact on this resource. In order to qualify for initial issuance of this permit, the Commission is proposing a range of aggregate landings from 0 to 500 pounds of these species over the 1994-1999 qualifying period (which mirrors the time period selected in the NFMP) for the Commission's consideration.

Although short of duplicating the comprehensive restricted access plan for NFPs being considered for implementation in 2003 for the ten species, establishing some initial issuance criteria at the time the permit is established will serve to prevent any increase in effort from individuals seeking to become new participants in the fishery. It is expected that this minimum landings requirement

shall be viewed as a “first cut,” similar to the process undertaken in the NFP development process, which will allow for time to develop a complete regional restricted access program similar to the one under consideration for adoption in December 2002.

The PFMF’s OY value for 2003 of 351 MT for deeper water nearshore rockfish (which comprise all but one of the species proposed for inclusion in the state’s Deeper Water Nearshore Fishery Permit program) is lower than recent catches of those species by sport and commercial fisheries, and therefore, additional management actions to curtail catch were needed. In the case of recreational fisheries, this resulted in only a six month fishing season for rockfish, and in the case of commercial fisheries, highly restrictive trip limits were established for the open season. However, additional controls are needed to prevent predicted increases in commercial effort aimed at catching a reduced level of allowable catch.

In May of 2002, the Commission established control dates for these nine species that serve to notify commercial fishermen that if they have not participated in this component of the nearshore fishery prior to 1999, they may not qualify for participation in a fishery for these species under a future restricted access program. This action demonstrated a willingness by the Commission to proceed with restricting access to this resource, followed by additional guidance provided to the Department to begin work on program development. Therefore, this regulatory action should be viewed as the next step in this process.

Minor changes have been made to the originally proposed regulatory language since the Initial Statement of Reasons was drafted on November 25, 2002 and the notice was filed with the Office of Administrative Law. The description of the proposed regulatory action provided in the Initial Statement of Reasons dated November 25, 2002 serves to substantiate the need for establishing a Deeper Nearshore Species Fishery Permit. However, since that time, internal review of the proposed program by the Department’s License and Revenue Branch and the Department’s Marine Region have prompted the need for slight revisions, which are described below.

Inclusion of an effective date of the permit requirement in Subsection 150.02(a) serves to clarify that the permit will be needed beginning April 1, 2003, the date of the onset of the 2003-04 commercial permit year, and consistent with Fish and Game Code Section 7857. This modification to the language is non-substantive and clarifying, and does not differ from the intent of the originally noticed language.

The word 'Fishery' was added to the title of the permit, and the term 'fish' was added in places where a more detailed description of the scope of the permit would be helpful to the reader for clarity. The term 'water' was removed from the title as it was unnecessary.

In Subsection 150.02(b), monkeyface eel was removed from the list of species for which a Deeper Nearshore Species Fishery Permit is required. Based on the Department's commercial landings database and other data sources, monkeyface eel should not be categorized as a 'Deeper Nearshore Species' as it is not caught in the same aggregation as the other deeper nearshore rockfish species outlined in the proposed language of Subsection 150.02(b). While the Commission adopted 'permit' and 'gear' control dates for other nearshore species in its actions establishing sections 150.02 and 150.04, Title 14, CCR, in May 2002, these control dates were intended to cover all species included in the Nearshore Fishery Management Plan that were not already regulated under the control dates that were established for shallow nearshore species for which a Nearshore Fishery Permit is required according to provisions of sections 150 and 150.01, Title 14, CCR. The action to establish the control dates in sections 150.02 and 150.04 was not meant to imply that the species covered under it would necessarily be managed as an aggregate. Since that time, based on actions by the Pacific Fishery Management Council to establish a separate Optimum Yield value for the deeper nearshore rockfish species, it has become clear that this group of fish is best managed as an aggregate species group. Including monkeyface eel with that aggregate group is not warranted.

Commercial fishing activity for monkeyface eel has been very limited, and occurs largely in shallow nearshore areas, rather than deeper nearshore areas. Since 2000, only approximately 600 pounds have been landed commercially, with about half of this volume taken by two individuals. Conversely, the deeper nearshore rockfish species have been fully utilized. Based on commercial fish ticket data, monkeyface eel are taken primarily in conjunction with other fishing activity for shallow nearshore species. As a result, including monkeyface eel with the aggregation of deeper nearshore rockfish species under one permit does not make biological sense, and could lead to a bycatch situation. If Deeper Nearshore Species Fishery permit holders were to pursue monkeyface eel fishing, they would likely catch (which may result in some mortality) many species of shallow nearshore rockfish, cabezon and greenlings that are not a part of the deeper nearshore species complex, but are species that instead are covered under provisions of the existing Nearshore Fishery Permit in

sections 150 and 150.01, Title 14, CCR. Consequently, the Department recommends maintaining the control date provisions for monkeyface eel, but not requiring a Deeper Nearshore Fishery Permit to commercially land them.

While this proposed regulatory change does differ from the text presented in the Initial Statement of Reasons dated November 25, 2002, excluding monkeyface eel from the permit requirement is not likely to impact a participant's ability to qualify for a permit, given the fact that the monkeyface eel fishery is of such low volume.

In addition to changes in Subsection 150.02(b), the exclusion of monkeyface eel in the proposed permit requirement for the deeper nearshore species group resulted other in minor technical or clarifying changes to the proposed regulatory language in subsections 150.02(e) and (h), and subsections 150.04 (a) and (b), as well as the subject titles for each Section.

In Subsection 150.02(e), an addition was made to language regarding the permit application process in order to provide requirements for late applications. While the originally noticed language in the Initial Statement of Reasons dated November 25, 2002 does not provide any such criteria and requires submission of the application by September 30, 2003, establishing a \$50 late fee for individuals submitting an application between October 1 and October 31, 2003, will serve to provide some leeway for applicants who may not be aware of the new permit requirement. Furthermore, Section 7852.2 of the Fish and Game Code provides for a late application period and a \$50 late fee for any permit where renewal is required for any commercial permit. Additionally, regulations providing for a late application processes are a routine component of most permit requirements established by the Commission. While this addition of a late application period is more than a technical clarification and a 15-day re-notice is warranted, it does not differ from the original intent of the proposed regulatory program, yet serves to incorporate the statutory requirements.

In Subsection 150.02(f), regarding the appeals process, the required postmark date to submit an appeal to the Department was changed from December 31, 2003 to March 31, 2004. This change is consistent with the date provided in statute in Fish and Game Code Section 7858 for permit appeal deadlines for limited entry fishery permits, and is consistent with recently-adopted provisions for appeal for 'shallow' nearshore fishery

permits in Section 150, Title 14, CCR. This change to the date is also needed in order to provide enough time for the Department to make a determination regarding eligibility upon receipt of the initial application, provide this notification back to the applicant, and then allow the applicant to draft an appeal based on that information. Given the extension of deadlines based on inclusion of a late application process in subsection 150.02(e) which results in submission of initial applications as late as October 31, 2003, more time is needed. Although this change differs from what was provided in the language provided with the Initial Statement of Reasons dated November 25, 2002, in terms of the potential impact to affected parties the change to a later date would be advantageous to those who would be seeking appeal of the Department's determination. Again, while this change to the date is more than a technical clarification and a 15-day re-notice is warranted, it does not differ from the original intent of the proposed regulatory program, yet serves to incorporate the statutory requirements.

Additional date changes were made to language in Subsection 150.02(g)(2) regarding the renewal date for the deeper nearshore species permit. For consistency with other commercial fishery permits, a renewal date of April 30, rather than June 30 of each year was deemed more appropriate. As in Subsection 150.02(e), a late application process and associated \$50 fee were included as additional provisions.

- (b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 7071, **7852.2**, **7858** and 8587.1, Fish and Game Code.

Reference: Sections 7071, **7852.2**, **7857**, **7858**, 8585.5, and 8587.1, Fish and Game Code.

- (c) Specific Technology or Equipment Required by Regulatory Change:

No new or specific technologies or equipment are associated with the proposed regulations.

- (d) Identification of Reports or Documents Supporting Regulation Change:

Nearshore Fishery Management Plan, 2002.

(e) Public Discussions of Proposed Regulations Prior to Notice Publication:

Public meetings at which the Commission discussed and adopted the control date for deeper water nearshore species were held March 8, 2002 in San Diego, CA; April 5, 2002, in Long Beach, CA; and May 9, 2002 in Fresno, CA.

V. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

The Commission has determined that no alternative considered would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

(b) No Change Alternative:

As described in Section IV(a), not adopting the proposed regulations would demonstrate an intention to leave the commercial nearshore fishery for black rockfish, blue rockfish, brown rockfish, calico rockfish, copper rockfish, monkeyface eel, olive rockfish, quillback rockfish and treefish completely open-access. Such an approach conflicts with guidelines in the Marine Life Management Act which stress precautionary management for utilized commercial fishery resources. Establishing control dates in May 2002 for this segment of the nearshore fishery has already served to notice fishermen that limited-access programs may be developed for future implementation and is a recognized strategy outlined in the Commission's policy governing restricted access commercial fisheries.

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation.

VI. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VII. Impact of Regulatory Action:

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businessmen to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. Each nearshore fishery permittee, buyer or processor is considered a business. The proposed regulations are not expected to have a significant statewide adverse economic impact on businesses. By requiring an aggregate total of between 0 and 500 pounds landed between 1994-1999 some unknown number of fishermen may be excluded from the fishery at this time. However, as stated above, this regulatory action is considered a "first cut" to address the issue of excess fishing capacity and the long-term viability of the deeper water nearshore fish species. If the development of a formal restricted access program is deemed to have the potential for adverse economic impact, the matter will be addressed at the time those regulations are considered by the Commission.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California: None

- (c) Cost Impacts on a Representative Private Person or Business:

The Commission is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None

- (e) Nondiscretionary Costs/Savings to Local Agencies: None

- (f) Programs mandated on Local Agencies or School Districts: None

- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None
- (h) Affect on Housing Costs: None

Updated Informative Digest/Plain English Overview

In May of 2002, the Commission established control dates for nine species of nearshore fish stocks that serve to notify commercial fishermen that if they have not participated in this component of the nearshore fishery prior to 1999, they may not qualify for participation in a fishery for these species under a future restricted access program. These species include black rockfish, blue rockfish, brown rockfish, calico rockfish, copper rockfish, monkeyface eel, olive rockfish, quillback rockfish and treefish, which are the nearshore species for which a Nearshore Fishery Permit is not required. This action demonstrated a willingness by the Commission to proceed with restricting access to this resource.

The Commission is proposing to adopt regulations which would establish a Deeper Nearshore **Species** Fishery permit specifically to cover **the eight rockfish species of this group in order** to prevent additional fishing effort **on these resources which may occur as a result of displacement from the shallow component of the nearshore fishery, or from closure of shelf rockfish fisheries. This permit would not be required for the commercial take of monkeyface eel.** In order to qualify for initial issuance of this permit, the Commission will select from a range of aggregate landings between 0-500 pounds of these **rockfish** species landed between January 1, 1994 and December 31, 1999.

The Commission will also select a fee for the permit from a range of \$125 - \$1200. Additionally, the regulations also provide permit appeal and renewal processes for the deeper nearshore fishery permit, including provisions for late applicants.

Additional changes are proposed which make minor modifications to existing regulatory language that establishes a control date for a gear endorsement program for these species.